No. 9564

In the

United States Circuit Court of Appeals

For the Ninth District

TOM WING ART, alias WING FOOK TOM, alias SHORTY YUEN,

Appellant,

vs.

WILLIAM A. CARMICHAEL, District Director of U. S. Immigration and Naturalization Service, District No. 20,

Appellee.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Divisions.

APPELLANT'S PETITION FOR RE-HEARING

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PETITION FOR RE-HEARING

To the Honorable, the Judges of the above-entitled Court:

TOM WING ART, Appellant in the above-entitled matter, respectfully requests the above-entitled Honorable Court that he be granted a re-hearing in the above-entitled cause after adverse decision made and entered on January 9th, 1941, affirming the action of the United States District Court for the Southern District of California, Southern Division, dismissing writ of habeas corpus, and as grounds for said re-hearing the appellant respectfully set forth the following:

That the Learned Court has rested its decision upon the sufficiency of the evidence to sustain the findings of the Attorney General, a matter conceded by Appellant in his briefs, without mentioning or giving any consideration to the point raised by Appellant in this appeal, to-wit: That the facts set forth in those findings were not sufficient to constitute any of the deportable offences stated in the warrant of deportation under which the Immigration authorities were seeking to deport the Appellant. This point involves not only the application of the Immigration Laws of the United States to the facts in the present case but, also, the interpretation thereof as well as the authority of the Attorney General derived from said laws; questions of law within the jurisdiction of the United States District Courts and subject to review by such Courts in Immigration matters by writ of habeas corpus.

ARGUMENT.

The Learned Court, in the opinion filed, disposes with Appellant's case and the legal questions raised in his brief, in the following language:

> "The assertion, in appellant's brief, that the record contains no evidence that appellant managed or was connected with the management of a house of prostitution or received, shared in or derived benefit from the earnings of a prostitute, is unwarranted and false. The record reeks with such evidence."

Appellant, in his brief and counsel during the oral argument before the Learned Court, conceded "that the record contains evidence" sufficient to support the findings made by the Attorney General and that the facts so found establishes that appellant has committed acts and pursued a course of conduct condemned by society as detrimental to its general welfare and highly immoral. However, appellant in this appeal presents an entirely different question, to-wit: Whether the facts before the Learned Court, the immoral acts and immoral conduct found by the Attorney General to have been committed or pursued by appellant, constitute any of the offense set forth in the warrant of deportation: a question of law involving the construction and interpretation of Section 19, Immigration Laws of February 5, 1917.

Appellant, by his appeal, seeks to have a judicial construction and interpretation of the language used by Congress in said Section 9, particularly as to the offenses mentioned in clauses 6 and 7 thereof, and a determination whether the facts found by the Attorney General are sufficient to constitute any of these offenses. The Learned District Court having dismissed the writ of habeas corpus by a minute order that "Petition for Writ of Habeas Corpus is denied," Transcript, page 16, without any discussion or mention of the legal questions raised by Appellant

The construction and interpretation of legislative en-

actments has, at all times since the adoption of the Constitution, been a subject of long and heated controversies among the members of the Bench as well as among members of the Bar. That counsel may not be in accord with the views and opinions of this Learned Court as to the construction and interpretation of the language used by Congress in clasuses 6 and 7, Section 19, Immigration Laws of February 5, 1917, is not an unusual situation; such a disagreement between counsel and the Court upon a question of law, should not be brushed aside with a statement that appellant's assertion as to his position "is unwarranted and false."

Counsel's construction and interpretation of the language used by Congress in clauses 6 and 7 of Section 19, of said Immigration Laws, may be erroneous, but as it involves no question of fact, it cannot be "false." Appellant has consistenly stood upon the proposition that the facts found by the Attorney General are insufficient, as a matter of law, to constitute the deportable offenses set forth in the warrant of deportation issued in the present case.

The record contains nothing whatsoever impunging counsel's good faith in the prosecuting of the present appeal nor in the argument made in support thereof. If counsel be mistaken in his contentions as to the proper construction and interpretation to be placed upon clauses 6 and 7, Section 19, of said Immigration Laws, the error is one in his understanding of the law, not from the lack of his appreciation of his obligation to be

fair, open and truthful to the profession that he follows and to the tribunals established to dispense justice to all alike.

Counsel has been in the practice involving Immigration Laws of the United States for more than twenty years, and knows the futility of seeking a judicial review, by writ of habeas corpus, of the findings of fact of an administrative bureau; would not knowingly waste his own time and efforts in bringing such a proceeding, let alone the time and energy of this Learned Court.

Counsel has been active in his chosen profession for almost forty years and has never, knowingly made any false or unwarranted statement to the Court or made any assertion as to the existence of any fact or any condition that he did not believe was warranted by the facts and circumstances within his knowledge; nor has he knowingly urged upon the Court any principle of law or theory as to what the law should be, that he did not believe to be true and tended to throw light upon the question at issue before the Court.

The appeal involves a study of the language used by Congress in clauses 6 and 7, Section 19, Immigration Laws of February 5, 1917, not simply a reading of the evidence contained in the Immigration record to determine whether it "reeks" with evidence of immortality.

The control, regulation and suppression of sexual immorality and other personal vices that are detrimental

to the public welfare are matters of police vested in the state and local authority. The Federal Government has but a limited and exceptional power over such matters, and Congressional legislation upon such subjects must be strictly construed. Appellant's contention, in present appeal, is that clauses 6 and 7, Section 19, Immigration Laws of February 5, 1917, do not empower the Attorney General to deport an alien for the acts and conduct found by him in the case at bar, and that his legal conclusion that they so do, is subject to review by the Court like any other matter of law that arises in a proceeding before an administrative bureau.

Counsel holds no brief for immorality in any of its forms; on the other hand, counsel, in conformity with his oath as an officer of this Honorable Court, stands ever ready to protect and defend the civil liberties and Constitution rights to all that claim his service. Counsel, in fulfilling this obligation, takes the position that no man is so low, so vile, so immoral, so deep in iniquity that he is beyond the protection of our laws or forbidden to enter our Courts that he may be sheltered under the shield of Justice. In these United States we have no "untouchables" to whom the Temples of Justice are closed. The cry of "unclean" in this country is not a call to be unjust.

Appellant is an alien, lawfully admitted in to the United States, and who, has resided therein over fifteen years; an alien resident entitled to the protection of the Constitution of the United States and its laws. The vil-

est creature, under the Constitution and the laws of the United States, has the right to have the laws of the land applied in determining any cause in which he may become involved, with the same force and effect as in the cause of the most righteous and most respected member thereof. No man, however, immoral or unworthy he may be, is beyond the protection of the Court or beneath the court's consideration.

Counsel concedes that the record "reeks" with evidence of sexual immorality and personal vices detrimental to the public welfare and offensive to the sensibilities of all right living citizens. Nevertheless, the obligation rests upon the Courts to delve into these offensive, ill-smelling acts of immorality and general depravity that the Attorney General has found to exist in the case at bar, and to determine for themselves whether such acts are of the kind and nature that Congress denounced as grounds upon which the Attorney General may deport a resident alien of the United States.

Appellant conceded, not only that the findings were unsupported by the evidence, but that the acts and conducts so found to have been committed by appellant or pursued by him, were immoral and detrimental to the public welfare; perhaps violative of state and local laws and ordinances.

Appellant contends his appeal should be determined by a study of the Immigration Laws of February 5, 1917, Section 19, clauses 6 and 7, and an examination of

the facts found by the Attorney General; that is, the provisions of said clauses applied to the acts and conduct of appellant and a determination if such acts and conduct are within the specific immoral offense described in the Immigration Laws; and, not by the personal re-action of the members of the Learned Court against offenses involving sexual immorality generally.

That neither the Court nor the Attorney General has the authority or power to decide what aliens may or may not remain in the United States. That authority and power is vested in Congress alone as the legisative branch of our Government. Until Congress has spoken all aliens who have been lawfully admitted into the United States have a right to be and remain within the United States.

Congress has not assumed the power to regulate prostitution or to protect the general public from immorality in the various States, and neither the Immigration Service nor the Federal Courts should assume to exercise such police powers over the individuals of the several States. Prostitution, public immorality and those who are engaged in such reprehensible business or associated therewith are subjects of local control. The State in the exercise of that control must follow the rules and principles of the common law—and in prosecution of those who violate the local law the accused must be granted a trial by jury. Congress never intended that the U. S. Immigration Service or its officers or administrative bureaus should be an additional means

placed at the disposal of the local authority to aid in the control, regulation and suppression of prostitution whereby those who offend the local authority may be deported whenever the evidence be insufficient to warrant a conviction in the State Tribunals.

It being apparent from the opinion filed, that the Learned Court rested its decision upon the Immigration Record and failed to consider the Immigration Laws of the United States as to whether the warrant of deportation was supported by facts sufficient to bring said cause within the provisions of said Immigration Laws.

Perhaps such omission by the Learned Court to take into consideration the Immigration Laws upon the subject herein under controversy was the result of counsel's failure to state clearly the point upon which he relies as error of law. It is for the purpose of making a more successful effort by counsel to bring out the contention, that this petition for rehearing has been filed.

WHEREFORE upon the foregoing grounds, it is respectfully urged that this petition for rehearing be granted and that the judgment or order of court be upon further consideration reversed.

WILLIAM H. WYLIE,
H. P. LARSON BECK,
HUGH A. SANDERS,

By.....

Attorneys for Appellant.

I, counsel for the above-named appellant, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

WILLIAM H. WYLIE.